EVIDENCE

THE JUDICIAL NOTICE OF FOREIGN LAW ACT

In 1936 the National Conference of Commissioners on Uniform State Laws adopted The Judicial Notice of Foreign Law Act,[1] the purpose of which was to standardize and simplify the proof of laws of foreign states.[2] The Ohio General Assembly passed a modified version of the Uniform Judicial Notice of Foreign Law Act, effective September 7, 1939.

Ohio G.C. Section 12102-31 reads as follows:

"Every court of this state shall take judicial notice of the statutes of every state, territory and other jurisdiction of the United States."[2a] The provision for the judicial notice of the common law of other states was omitted from the Ohio statute. One may presume that this omission spells the doom of the common law of other states in so far as judicial notice by the Ohio courts is concerned. However, it does not necessarily follow that cases of sister states construing their own statutes are also not to be judicially noticed by Ohio courts.

The distinction between common law and decisions based on statutes may not appear very clear, but such a distinction does exist, as is well supported by authorities.[3] Common law has been frequently defined as including "those principles, usages and rules of action applicable to the government and security of persons and property, which do not rest for their authority on any express and positive declaration of the will of

[1] The Uniform Judicial Notice of Foreign Law Act provides as follows:

I. Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States.

II. The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information.

III. The determination of such laws shall be made by the court and not by the jury, and shall be reviewable.

IV. Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law of another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise.

V. The law of a jurisdiction other than those referred to in section 1, shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice.

VI. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

VII. This act may be cited as the Uniform Judicial Notice of Foreign Law Act.

[2] The American Bar Association Committee on Improvement of the Law of Evidence in 1937-38, with only one dissenting vote, recommended that this act be enacted by all legislatures. The Ohio State Bar Association recommended the enactment of this uniform law to the Ohio General Assembly.

[2a] The remainder of the act follows the Uniform Judicial Notice of Foreign Law Act.

[3] 11 AMER. JUR. 153-169; 8 WORDS AND PHRASES (Perm. Ed. 1940) 84-93; 15 C.J.S. 611.

the legislature."[4] Bouvier's Law Dictionary,[5] in defining common law, states that there is a difference between common law and decisions of courts based on statutes, and that the latter cannot be considered as common law.

Assuming then that decisions based on statutes are not common law, would courts under a statute like section 12102-31 interpret such provision as giving them the authority to take judicial notice of decisions courts of sister states construing their own statutes? Justice Story, in *Swift* v. *Tyson*,[6] in interpreting section 34 of the Judiciary Act of 1789, ch. 20,[7] laid down the rule that although the federal courts would be be bound to follow the common law of the state, still they would follow the state statutes. The word "statutes" was defined by the court as including "the positive statutes of the states and the construction thereof—adopted by the local tribunals . . . " This definition as given by Justice Story has been followed by a long line of cases.[8] The Ohio courts to date have not defined the word "statutes" as used in section 12102-31. That being so, besides considering the numerous United States Supreme Court decisions and other citations distinguishing between common law and decisions based on statutes, the Ohio courts in construing this act will have to look to the intent of the legislature in passing it. In doing so it is strongly urged that the courts interpret the intent of the legislature in such a manner as to give some beneficial effect to section 12102-31, denuded by the omission of common law.

In determining this intent, some consideration might be given to the fact that before the enactment of section 12102-31 statutes of another state purporting to be published by its authority were under section 11498 allowed to be received by the courts of this state as presumptive evidence of such law.[9] It was even then a simple procedure to have these foreign statutes received, requiring little time and effort on the part of the attorney; and as far as facilitating the admittance and recognition of foreign statutes is concerned, there was little need for change in the statute.[10] The General Assembly in following the recommendations of the American and the Ohio Bar Associations clearly

[4] 8 WORDS AND PHRASES (Perm. Ed. 1940) 84, citing State of Kansas v. State of Colorado, 206 U.S. 46, 51 L.Ed. 946, 25 Sup. Ct. 655 (1906).

[5] 1 BOUVIER'S LAW DICTIONARY (3rd Rev.) 565. Bouvier says, "However artificial this distinction may appear, it is nevertheless of the utmost importance and bears continually the most wholesome results."

[6] 41 U.S. 1, 10 L.Ed. (1842).

[7] 28 U.S.C.A. sec. 725.

[8] Lane v. Vick, 44 U.S. 586, 34 L.Ed. 500, 10 Sup. Ct. 850 (1889); Townsend v. Todd, 91 U.S. 453, 23 L.Ed. 413 (1875); Bucher v. Chesshire Railroad Co., 125 U.S. 555, 31 L.Ed. 795, 8 Sup. Ct. 974 (1888).

[9] 17 O. JUR. sec. 523.

[10] See note 20 Ohio Op. 41, Ohio L.R. Mar. 31, 1941.

intended to release many of the cumbersome, technical procedural steps in pleading the law of another state. Surely the legislature did not enact a law which does not cure any defect in existing laws. This belief is greatly strengthened by section 12102-36 which states: "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." It may be argued that by this the legislature evidenced its intent that section 12102-31 should be interpreted as including more than just statutes *per se* in order "to make uniform the law of those states which enact it." Furthermore the legislature in section 12102-33 said that "the determination of such laws shall be made by the court . . . " Again we may argue that the term "laws" refers back to section 12102-31 and one might reasonably assume that the legislature meant something more than just statutes alone, for *laws* is a broad term and can easily be construed as including decisions based on statutes as well as statutes *per se*.[11]

It may also be argued that statutes *per se* are barren and not sufficiently informative, for it is the interpretation of these statutes by the courts that give them their real worth and applicability. One does not think of statutes without at the same time attempting to find the court's interpretation of them. According to the United States Supreme Court[12] statutes and decisions based on them are almost as one, and it would seem unlikely that the Ohio legislature meant it to be considered as otherwise.

These arguments weigh heavily in favor of a liberal construction of "statutes" as used in section 12102-31 so as to include decisions construing statutes as well statutes *per se*. The future adaptibility of this section so that it will facilitate the invocation of judicial notice laws of a sister state at least in so far as decisions based on statutes are concerned, rests within the discretion of the courts. They have the power to interpret this section so strictly and narrowly as to render it valueless, or by interpreting statutes to include cases construing statutes, they may promote the purpose and intent of the Uniform Judicial Notice of Foreign Law Act, in giving some measure of uniformity in the recognition of the laws of the states by their sister states.

L. G.

[11] 2 BOUVIER LAW DICTIONARY 1876; 24 WORDS AND PHRASES (Perm. Ed. 1940) 316, 317.

[12] Swift v. Tyson, 41 U.S. 1, 10 L.Ed. 865 (1842).